

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

PHYTELLIGENCE, INC.,

Plaintiff,

v.

WASHINGTON STATE UNIVERSITY,

Defendant.

No. 2:18-cv-00405-RSM

PERMANENT INJUNCTION AND  
ORDER ON THE COUNTERCLAIM  
OF WASHINGTON STATE  
UNIVERSITY

Pursuant to the stipulation of the parties, the Court enters this Permanent Injunction and Order on the claims for relief asserted in the Counterclaim of Defendant Washington State University (Dkt No. 1-2 at 5-14).

1. As used in this Permanent Injunction and Order, the term “Enjoined Persons” refers to (a) Plaintiff Phytelligence, Inc., (“Phytelligence”); (b) the officers, agents, servants, and employees of Phytelligence; and (c) other persons who are in active concert or participation with the persons described in (a) and (b).

2. As used in this Permanent Injunction and Order, the term “WA 38” refers to the apple cultivar described and claimed in United States Plant Patent No. 24,210.

3. Effective immediately, except to the extent permitted by Paragraph 5 of this Permanent Injunction and Order, the Enjoined Persons are permanently enjoined from (a) asexually reproducing WA 38 plants throughout the United States; (b) using, offering for sale, or selling asexually reproduced WA 38 plants, or any of their parts, throughout the United States; and (c) importing asexually reproduced WA 38 plants, or any parts thereof, into the

1 United States. The restrictions imposed by this Paragraph 3 shall cease upon expiration of  
2 United States Plant Patent No. 24,210.

3 4. Notwithstanding Paragraph 3 of this Permanent Injunction and Order, an Enjoined  
4 Person may engage in any conduct with respect to WA 38 plants that is permitted: (a) pursuant  
5 to the terms of a license granted by the owner of United States Plant Patent No. 24,210;  
6 (b) pursuant to the terms of a sublicense granted by a licensee or sublicensee of United States  
7 Plant Patent No. 24,210 that has authority to grant such a sublicense; or (c) to be performed by  
8 any member of the general public without a license. In addition, Phytelligence may continue to  
9 retain possession of WA 38 plants and plant parts that are currently in its possession until  
10 Phytelligence is required to return or destroy such WA 38 plants and plant parts pursuant to  
11 Paragraph 7 of this Permanent Injunction and Order.

12 5. Effective immediately, except to the extent permitted by Paragraph 6 of this  
13 Permanent Injunction and Order, the Enjoined Persons are permanently enjoined from using the  
14 term COSMIC CRISP, or any term confusingly similar to that term, as a trademark or service  
15 mark in connection with the sale, offering for sale, distribution, or advertising of any goods or  
16 services.

17 6. Notwithstanding Paragraph 5 of this Permanent Injunction and Order, an Enjoined  
18 Person may use the term COSMIC CRISP, or any term confusingly similar to that term, to the  
19 extent such use is permitted: (a) pursuant to the terms of a license granted by the owner of  
20 United States Trademark Registration No. 5,330,199; (b) pursuant to the terms of a sublicense  
21 granted by a licensee or sublicensee of United States Trademark Registration No. 5,330,199  
22 that has authority to grant such a sublicense; or (c) by any member of the general public  
23 without a license, including under the doctrine of nominative fair use.

24 7. If the Court's Order Granting Defendant's Motion for Summary Judgment (Dkt.  
25 No. 96) is affirmed in all respects on appeal, within 14 days after all appeals from the Order  
26 Granting Defendant's Motion for Summary Judgment have been exhausted, Phytelligence shall  
27 (a) destroy or return to Washington State University all WA 38 plants and plant parts in its

1 possession, custody, or control; and (b) file with the Court a statement signed under penalty of  
2 perjury by a managing agent of Phytelligence stating Phytelligence has complied with the  
3 requirements of Paragraph 7 of this Permanent Injunction and Order.

4 8. The Parties' Stipulation Regarding Handling of WA 38 Plants and Parts During  
5 Litigation (Dkt. No. 21) shall remain in effect until further order of the Court.

6 9. Washington State University has waived its request for an award of damages on its  
7 Counterclaim against Phytelligence. Accordingly, no damages are awarded to Washington  
8 State University on its Counterclaim.

9 10. Subject to the reservation of Phytelligence's right to contest jurisdiction on appeal,  
10 this Court shall retain jurisdiction over the subject matter and parties for the purpose of  
11 enforcing this Permanent Injunction and Order.

12 DATED this 16 day of July 2019.

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14 RICARDO S. MARTINEZ  
15 CHIEF UNITED STATES DISTRICT JUDGE  
16  
17

18 Presented by:

19 Davis Wright Tremaine LLP  
20 Attorneys for Defendant Washington State University

21 By: s/ Stuart R. Dunwoody  
22 Stuart R. Dunwoody, WSBA #13948

23 Approved for entry:

24 Wilson Sonsini Goodrich & Rosati  
25 Attorneys for Plaintiff Phytelligence, Inc.

26 By: s/ Barry M. Kaplan  
27 Barry M. Kaplan, WSBA #8661